ZAMRI OMAR

v.

IDRIS MOHAMED NOR

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[CIVIL SUIT NO. 25-116-86]
1 APRIL 1989

TORT: *Negligence - Road traffic collision between motorcyclists - Question of liability and quantum.*

The plaintiff was riding motorcycle No. BBH 6873 along the road leading from Behrang towards the direction of Tanjung Malim through Ketoyong Road on 11 December 1984 at about 4.30 p.m. when there was a collision with the motorcycle BBY 2733 ridden by the defendant from the opposite direction. As a result the plaintiff suffered a comminuted depressed fracture of the right parietal bone and sued the defendant for damages for this injury and or special damages.

Held:

[1] On the facts of the case the defendant was found to be 80% liable as the Court was of the view that the plaintiff should have seen the defendant encroaching onto his path and should have taken steps to avoid the collision.

[2] On a 100% liability the Court awarded the following damages:

General Damages:

Pain and Suffering and loss of amenities	RM70,000
Loss of future earnings based on multiplier of 16	for balance period of multiplier or 12 RM57,000
Nursing care	RM150 per month agreed so for 50 months pre-trial RM7,500 and for balance period of multiplier of 12 - RM21,600
Special damages:	
Travelling expenses	RM500 (agreed)
Documents	RM48 (agreed towards costs)
Loss of earnings	RM400 a month agreed so for 50 months pre-trial RM20,000

[Interest to be awarded at 8% on general damages from the date of service of the writ to date of judgment and 4% on special damages from date of accident to date of judgment. Costs to be taxed accordingly]

Cases referred to:

Goh Beng Seng v. Dol bin Dolah [1970] 2 MLJ 95
Yang Salbiah & Anor. v. Jamil bin Harun [1981] 1 MLJ 292
Lim Eng Kay v. Jaafar bin Mohamed Said [1982] CLJ (Rep) 190
Liong Thoo v. Sawiyah & Ors. [1982] 2 MLJ 286
Tham Yew Heng & Anor. v. Chong Toh Cheng [1985] CLJ (Rep) 878
Teo Tio Khiang & Anor.v. Ooi Eng Teong [1987] 1 MLJ 198

Kow Ah Dek & Anor. v. K. Ratnasingam [1981] 2 MLJ 24
Pattan v. Periasamy Vellan [1988] 2 CLJ (Rep) 120
Udhayakumar s/o Vadivelu v. Chin Kon Tai [1985] CLJ (Rep) 802
Lee Boon Kiat v. Ng Sing [1982] 1 MLJ 229

For the plaintiff - Harbans Singh; M/s. Sandu & Co.
For the defendant - Kanagasabapathi; M/s. R.K. Nathan & Co.

JUDGMENT

Abdul Malek Ahmad J:

The plaintiff was riding motor-cycle No. BBH 6873 along the road leading from Behrang towards the direction of Tanjung Malim through Ketoyong Road on 11 December 1984 at about 4.30 p.m. when his vehicle collided with the motor-cycle No. BBY 2733 ridden by the defendant from the opposite direction. As a result, the plaintiff sustained a comminuted depressed fracture of the right parietal bone and is suing the defendant for damages for this injury and for special damages.

I shall first deal with the question of quantum. At the outset, both Counsel informed the Court that they had agreed to earnings being fixed at RM400 per month and nursing care at RM150 per month. They had also agreed to item (b) of special damages for travelling expenses at RM500.

At the end of the trial, I was of the view that item (a) of special damages for unascertained damages to the motorcycle beyond repair had not been proved and made no award. Counsel for the defendant also conceded to RM48 in item (c) of special damages for cost of relevant documents but submitted that it should go towards costs. For item (d) of special damages for unascertained loss of income at RM700 a month continuing, since RM400 had been agreed to, the Court made an award of RM20,000 for the pretrial 50 months.

For pain and suffering and loss of amenities, I had considered the four medical reports on the plaintiff which have all been agreed to except for the last paragraph in P1. The first by the medical officer of the Jabatan Bedah Otak dan Saraf of the Kuala Lumpur General Hospital is dated 10 July 1985 and the relevant paragraphs state:

> On examination Laceration over (R) parieto-occipital region. On admission here, CAT Scan showed no intracranial haematoma-bifrontal intracranial air present. Shift of the ventricular system to the (L) large low density area (R) prietooccipital region.
>
> X-ray skull showed a comminuted depressed fracture of the (R) parietal bone.
>
> Carotid angiogram done showed - shift of midline structure to the (L). Intracranial air present in the frontal region.
>
> He was operated (Parieto-occipital) craniotomy with evacuation of the minimal haematoma and repair of a tear in the dura done.
>
> Post operatively progress good. He is on our follow up and discharged with dilantin and Encephabol.
>
> Yours sincerely,
>
> Sgd. (Dr. P. Anpalakhan)
> Pegawai Perubatan,
> Jabatan Bedah Otak dan Saraf,
> Hospital Besar,
> Kuala Lumpur.

The second which is dated 28 February 1986 is fairly long and reproduced below are the conclusions reached by the consultant neuro-physician of the Neuro-Medical Clinic:

> **In conclusion** this young man met with a major head trauma resulting in:
>
> 1. Transient loss of consciousness.
> 2. Communited depressed fracture of the right parietal bone which has healed well.
> 3. Right parieto-occipital haematoma with dural tear which needed operative craniotomy correction for evacuation of the haematoma.
> 4. As a result of the head injury, he has **permanent dense motor paralysis** of the left leg with left footdrop and contractures of the left ankle. As a result of the paralysis walk on his own and has to be helped around to the toilet and other chores around the house. He is **permanently wheel-chair ridden** due to the above deficit.
> 5. He also has motor weakness of the left upper extremity especially in the realm of practice movement. As such he is unable to do fine movements with the left hand. The above deficit is permanent.
> 6. He has mild impairment of higher cortical functions especially in the realm of immediate recent memory and slowness in doing calculations. The above deficit is secondary to the diffuseness of the head injury due to severity of the head trauma. It is likely that the above deficit may improve with time.
> 7. Due to the focal nature of the head injury over the right parieto-occipital area (with CT Scan evidence of localised brain atrophy), he has developed **focal with generalised** seizures following the head trauma. He is presently on anti-epileptic medications and has not had any seizures from the 3rd month following the head trauma. However, he will require long term anti-epileptic medications, failing which he may develop relapses of seizures. Despite having anti-epileptic medications, he may occasionally get breakthrough epilepsy. Recurrent epileptic attacks may cause trauma to his body and also may lead to premature neuronal fallout.
> 8. As a remote effect of the head injury, he may develop further atrophy of the cortical neurons leading to *presenile dementia*. The CT Scan done on 25 February 1986 already shows early localised atrophy over the right occipital region.
> 9. As a result of his neurological deficits, especially the dense paralysis of the left leg and increased tone in both lower extremities, he will never be able to walk independently on his own. He **will never be able to walk independently on his own**. He will never be able to resume any form of motor activities or obtain a job for the rest of his life. Marriage is an unlikely event for him. He will be a lifetime burden on his family.
>
> With regards
>
> Dr. C. Bala Ratnam.

The associate professor and consultant neurologist of the Department of Medicine of the University Hospital gave the third report dated 9 May 1987 and it is relevant to quote the summary:

> In summary, (1) there is no doubt that this patient has suffered severe degree of head injury. This has left him with a permanent impairment of his higher function, as reflected in impaired memory and slowness in doing calculations.
>
> (2) He also have left-sided limb weakness which has fortunately shown some recovery. His left hand is still slightly clumpsy and is able to function well except very fine motor movement. As for the lower limbs, he is only able to walk with support.

(3) He appears to have left homonymous hemianopia, which means some impairment in the left side of the vision.

(4) I do not expect him to be able to perform any job which require mental agility. In fact, his physical disability is such that he can only perform simple chores using the hands only. As such, for practical purpose, he is not employable.

(5) Although he is able to look after his personal hygiene and needs, I think he would need to live under a protected environment for the whole life.

(6) Although his epileptic seizure is now under control, I think it is likely that he will need medication whole life long. As such he would need to be followed up by a medical practitioner on and off.

Sgd. (Dr. C.T. Tan)
Assoc. Professor and Consultant Neurologist
Department of Medicine.

The fourth and final report is by the consultant neurosurgeon of the Das Neurosurgery Clinic dated 3 November 1988 and because of its length, I would only refer to the findings:

Conclusions

1. Encik Zamri sustained brain injury as a result of the accident on 11 December 1984. This rendered him unconscious. Prolonged post traumatic amnesia of at least 2 months duration persists even today.

2. He also sustained injury to right parietal lobe due to impact and depressed comminuted fracture.

This injury to the brain is visualised in the CT Scan. It is permanent lesion. As a result of this injury to that part of the brain (parietal and temporal lobes) he has:

a. left hemiplegia

b. left homonymous he nianopsia - he has lost left half of vision in each eye. This is permanent.

c. seizures.

3. He has to go on life long medication as the chance of getting seizures if medication is stopped is extremely high. Fortunately seizures are very well controlled with medication so far. Thus if he continue to be regular in medication the chance of fits in future is small.

4. Compared to the statements and findings made in the previous two medical reports issued by Dr. Balaratnam and assoc. prof. C.T. Tan he has shown improvement. However this is slow. Considering this fact I would expect him to continue to improve further. But this improvement would be very slow and incomplete. The chances of him becoming normal, however, is unlikely.

5. He is unemployable now. The chances of him earning a living in future is very small.

6. I would agree with assoc. prof. Dr. Tan that he would need to live under a protected environment.

7. With reference to your specific question if he is impotent, I would say that his sexual drive is probably suppressed because of the brain injury and altered personality.

Yours sincerely,

Sgd: (Dr. A. Mohandas).

I had compared and considered the injuries sustained by the plaintiff and his subsequent improvement with those suffered by the plaintiff in *Yang Salbiah & Anor. v. Jamil bin Harun* [1981] 1 MLJ 292 where RM70,000 was awarded, *Lim Eng Kay v. Jaafar bin Mohamed Said* [1982] CLJ (Rep) 190 where an award of RM80,000 was made, *Liong Thoo v. Sawiyah & Ors.* [1982] 2 MLJ 286 as regards which there was an award of RM100,000. *Tham Yew Heng & Anor. v. Chong Toh Cheng* [1985] CLJ (Rep) 878 and *Teo Tio Khiang v. Ooi Eng Teong* [1987] 1 MLJ 198 which were both Singapore cases where RM35,000 and RM70,000 were respectively awarded, *Kow Ah Dek & Anor. v. K. Ratnasingam* [1981] 2 MLJ 24 where there was an award for RM70,000 and *Pattan v. Periasamy Vellan* [1988] 2 CLJ (Rep) 120 where an award of RM75,000 was made, and was of the view that RM70,000 was a fair and reasonable amount to award for the injuries and residual disabilities suffered by the plaintiff here.

It is now relevant to consider the question of liability. Because of his condition, the plaintiff was not able to give evidence and his father (PW1) was not in a position to assist as he was not present at the scene. However, the plaintiff called two witnesses one of whom had seen the accident (PW2) and the other who took him to hospital (PW3).

PW2 told the Court that he was standing by the roadside about one chain from his house and under a banana tree at 4.30 p.m. on that particular day smoking when he saw a motor-cycle coming at a fast speed from Tanjung Malim, passed him and in trying to avoid a pothole swerved to the right and knocked into the plaintiff's motor-cycle coming from opposite. At first PW2 had some difficulty explaining his actual bearings but later maintained that he was facing Behrang. He also said that he had shouted to the motor-cyclist who had ridden past very fast from behind him to warn him of the pothole, that he could identify the defendant as that motor-cyclist, that both riders were riding alone and that both the motor-cycles had fallen on the right hand side of the road facing Behrang after the collision.

PW3 gave evidence that he was riding his motor-cycle from Behrang, that when he reached the scene the collision had taken place and that both the vehicles were on the left hand side facing Tanjung Malim and that he had taken the plaintiff to the hospital one mile away, holding the motor-cycle handle with his right hand and the plaintiff with his left, and that the plaintiff had arrived at the hospital in a semi-conscious state.

The defendant (DW1) estimated the time of the accident as after 2 p.m. but was not sure as he did not have a watch. However, he said that there were school children going home which prevented him from riding more than 5 feet from the edge of the road. After he had passed the school children, he saw a motorcycle about 100 feet coming from the opposite direction and zig-zagging to avoid potholes on the road. He added that the other motor-cycle encroached onto his path and as he was able to control his vehicle, the collision took place.

He insisted that he fell on his left side of the road after the collision whereas the plaintiff fell at the centre of the road. He denied that PW2 was present although the accident took place in front of PW2's house. He maintained that he could not swerve right because of a big Jabatan Kerja Raya pipe on the grass verge and could not swerve left because of a big drain under construction and also, as stated in his police report, because of the presence of two school children riding bicycles. He, however, confirmed that he had known PW2 for five or six years.

Learned Counsel for the defendant attacked the reliability of both PW2's and PW3's evidence stating that, in the case of PW2, it was quite odd for him to be standing under a banana tree smoking in the hot sun and, in the case of PW3, how he could have carried an unconscious accident victim to the hospital one mile away on the pillion seat.

Having seen and heard the both PW2 and PW3, I saw no reason to reject their evidence. PW2 had explained that he had completed work for the day and was relaxing outside his house at the relevant time. It must be borne in mind that he was a friend of the defendant for a number of years, and the defendant had confirmed this, and there was no reason why he should give evidence against the defendant who he knew and for the plaintiff who he did not know. Further, the defendant in his evidence admitted that he was zigzagging to avoid potholes although he denied encroaching onto the other side as alleged by PW2.

As for PW3's testimony, he had corroborated PW2's evidence that the two motor-cycles were on the right hand side facing Behrang after the accident. He also supported what PW2 said as regards assisting the plaintiff and not the defendant as the plaintiff was more injured than the defendant. The Court observed that he was following the plaintiff and if he was an untruthful witness, he could have easily told the Court that he had seen the accident to strengthen the plaintiff's case. Concerning the plaintiff's unconscious state, all the four medical reports were based on what had been told to the respective report writers who had based their reports on earlier reports and what had been told to them by the plaintiff's father. It must be remembered that the plaintiff's father was not at the scene and there is also no other evidence to say that it was not PW3 who had taken the plaintiff to the hospital or that the plaintiff was in an unconscious that I had accepted the evidence of PW3 that it was he who had taken the plaintiff to the hospital in a semi-conscious state after the accident.

It is also not disputed that the road was straight and that there was no centre white line. There are no marks on the sketch plan to indicate where the accident took place. However, based on the Court's assessment of PW2's and PW3's evidence, I accepted the plaintiff's version of the accident as being the more probable of the two put forward upon a balance of probabilities. I accordingly held that the accident had taken place on the plaintiff's side of the road as a result of the defendant encroaching onto the other side in trying to avoid a pothole. However, since there was no evidence to suggest that the plaintiff took any steps to avoid the collision, as he should have seen the defendant riding the way he did as it was a straight stretch, the Court was of the view that the plaintiff should be held contributory liable. In the event, the Court found the defendant 80% liable.

To recapitulate on the question of quantum, the Court had made the following awards on 100% liability:

Special Damages:

item (a) no award

item (b) RM500 (agreed)

item (c) RM48.00 (agreed - towards costs)

item (d) RM400 a month agreed so for 50 months' pretrial RM20,000.

General Damages:

pain and suffering and loss of amenities	RM70,000
Loss of future earnings based on multiplier of 16	for balance period of multiplier or 12 RM57,600
Nursing care	RM150 a month agreed so for 50 months' pre trial RM7,500 and for balance period of multiplier of 12 RM21,600

a Interest will be at 8% on General Damages from the date of service of writ to the date of judgment and 4% on Special Damages from the date of accident to the date of judgment. Costs are to be taxed accordingly.

Also found at [1989] 2 CLJ 267

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